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No. .....

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1983

CLAIR OLSEN and GUITAR CITY STUDIOS, INC.,
a Utah corporation,
Petitioners,

vs.

CBS MUSICAL INSTRUMENTS, a division of
COLUMBIA BROADCASTING SYSTEMS, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is an antitrust private litigant now foreclosed by the doctrine of collateral estoppel from pursuing continuing acts of conspiracy, once a per se illegal combination has been proved, when the alleged acts of continuing conspiracy are different from those previously decided by the courts and the damage period in the continuing conspiracy is different from that for which damages were awarded, and mutuality did not exist between the parties.

2. Are co-conspirators found guilty in a per se illegal combination still jointly and severally liable under the antitrust laws and does a private litigant still

have the right to *elect* to take their damages from any or all of the named co-conspirators, or is it now proper for the courts to dismiss some of those named guilty co-conspirators, thereby allowing them to escape liability?

3. Will a private antitrust litigant still have Constitutional rights to present issues to the Federal Courts for decision, or is it now proper for the courts to refuse to consider those issues, where the undisputed evidence proved those issues were acts of unfair competition in furtherance of a per se illegal conspiracy and were presented as an inseperable part of the federal question of conspiracy?

DESIGNATION OF CORPORATE RELATIONSHIPS

The Guitar City Studios, Inc. filing this petition for Writ of Certiorari to the Tenth Circuit Court states that:

1. This is the original designation of corporation:

2. Guitar City Studios, Inc. is not owned by any present corporation.

3. Guitar City Studios, Inc. does not have an ownership interest in any subsidiaries;

4. Guitar City Studios, Inc. does not have any affiliates.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The above-named petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment in the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause affirming the judgment of the United States District Court for the District of Utah, which was entered in said Court of Appeals in Case No. 82-2398 on May 12, 1983.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals that was entered May 12, 1983 is unreported at the date of printing this petition, but is reproduced herein as Appendix A.

The final decision of the United States District Court for the Central District of Utah, October 15, 1982, should be reported in the 1982-2 Trade cases, but is not. Therefore it is reproduced herein as Appendix B.

Petitioners made a motion to file an out of time petition for rehearing to the Circuit Court of Appeals on June 14, 1983, decision is pending. A copy of that decision will be provided when available.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on May 12, 1983, and has not been reported as of the date of the printing of this petition. Jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This petition involves the following Constitutional Provisions, statutes and Federal Rules of Civil Procedure, copies of which are attached as Appendix E.

1. **The 5th Amendment to the Constitution of the United States.**

2. **The 14th Amendment to the Constitution of the United States.**

3. **The Sherman Act §§1 and 2, 15 U.S.C. §§ 1 and 2.**

4. **The Lahnam Trade Mark Act § 43(a), 15 U.S.C. § 1125(a).**

6. **Rule 52(a) Federal Rules of Civil Procedure.**

STATEMENT OF THE CASE

The petitioner sued the respondent and others under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, (hereinafter the Sherman Act), seeking treble damages under § 4 of the Clayton Act, 15 U.S.C. 13(e).

This law suit arises out of a factual situation in connection with and in continuation of a companion case called the Progressive case. Petitioners proved in the Progressive case per se illegal price fixing, vertical enforcement of resale price maintenance in furtherance of the price fix, refusal to deal to protect the price fix, territorialization in furtherance of the price fix and overt acts of unfair competition in furtherance of the conspiracy. The Progressive case is presently befor this court as Supreme Court Docket No. 82-2077.

Petitioners Clair Olsen and Guitar City Studios, Inc., (hereinafter Olsen), originally filed suit in the Federal Courts in April 1975, naming as defendants, Progressive Music Supply, Inc., (hereinafter Progressive), Acoustic Control Corp., (hereinafter Acoustic), Ovation Instruments, Inc., a/k/a Kaman Corporation, (hereinafter Ovation), Norlin Music, Inc., formerly Chicago Musical Instrument Co., (hereinafter Norlin), CBS Musical Instruments, a division of the Columbia Broadcasting System, Inc., (hereinafter CBS), and ARP Instruments, (hereinafter ARP). The geographical market was the state of Utah and the relevant product market is frets, electronics and percussion musical instruments, (hereinafter FEP instruments).

ARP and CBS were dismissed from the Progressive case in 1975 with the understanding they would deal with Olsen. When CBS refused to deal, attempts were made to rejoin CBS to the Progressive case. When

those attempts were rejected by the court, a new cause of action was filed against CBS. United States District Court for the Central Division of Utah No. C77-0013. The new cause of action, alleged a continuation of the proven Progressive conspiracy with issues of fact not decided in Progressive and a different damage period from Progressive.

The CBS case was dismissed by the District Court, October 15, 1982 without going to trial. The dismissal was based on the doctrine of Collateral Estoppel and the Amended Findings of Fact and Conclusions of Law, concluding the Progressive case in the District Court.

The 10th Circuit Court of Appeals affirmed the dismissal of the CBS case under the doctrine of Collateral Estoppel based on the Circuit's Opinion in the Progressive case. 10th Circuit Cross Appeal, case No's. 82-1357 and 82-1400, decided March 8, 1983.

The Progressive case went to trial in 1979. CBS was not a participant. The Trial Court made findings that CBS was a guilty co-conspirator in a per se illegal combinaton consisting of the aforementioned elements. The evidence was undisputed that CBS assisted Progressive in territorializing, fixing prices and eliminating all other CBS dealers, except Herger's Music in the relevant and geographic market in order to protect the price fix. Progressive and CBS conspired and agreed that CBS would impose upon Herger's Music, vertically enforced resale price maintenance. CBS also enforced a boycott agreement with Progressive whereby CBS prevented the transhipment of their instruments into the state of Utah from other retail dealers,

thereby protecting the price fix from competition. The Trial Court also found that prior to 1974-75 there was little or no competition for the CBS instruments from other FEP instruments in the trade.

A more detailed statement of the case as it relates to the proven conspiracy is set forth in the Progressive case supra. The following are presented as the issues in this case. 1.) Whether the doctrine of Collateral Estoppel forecloses the pursuit of continuing acts of conspiracy against a proven co-conspirator, where the issues of fact have never been decided by any court, the damage period is different from that previously before any court and mutuality does not exist between the parties. 2.) Whether a private antitrust litigant has the right to elect from which proven conspirators he may take his damages. 3.) Are acts of unfair competition in furtherance of conspiracy actionable under the antitrust laws?

Since this case is a companion case to the progressive case presently before this court and where the issues of unfair competition are duplicated in both cases, due to the dismissal of these issues in both cases being dismissed in silence without findings, Petitioner respectfully requests that the CBS and Progressive cases be combined and jointly decided before this court.

REASONS FOR GRANTING THE WRIT

The Decisions of the District Court and the 10th Circuit are in conflict with previous consistent interpretations of the antitrust laws, Federal Statutes, Federal Rules of Civil Procedure and basic principles of modern federal practice as articulated by this court and other Circuit Courts of Appeal and are therefore

a fundamental deprivation of the basic right to Constitutional due process and equal protection.

This subject has considerable importance to the antitrust practitioner, as to consistency in the judicial process and as to resolving a significant controversy between the Circuit Courts of Appeals.

SUMMARY OF THE ARGUMENT

Petitioner will first discuss the failure of the lower courts to allow prosecution of continuing issues of conspiracy where the issues of facts and damage period are different from those previously decided by the courts and in particular the dismissal of the case under the doctrine of Collateral Estoppel where it is undisputed that mutuality did not exist bewteen the parties. Next petitioners will discuss the propriety of the courts dismissing proven co-conspirators from a per se illegal combination thereby releasing a guilty party from any liability, as compared with an injured Plaintiffs right of election to take his damages from any of the jointly and severally liable proven co-conspirators. In conclusion petitioner will discuss the issue of unfair competition in furtherance of a per se illegal combination as an inseparable part of the Federal question of conspiracy and the propriety of the lower courts failure to consider such acts of unfair competition as actionable under the antitrust laws.

ARGUMENT

POINT I

PEITIONERS ARE ENTITLED TO PROSECUTE CONTINUING ACTS OF ANTITRUST CONSPIRACY.

This issue will be discussed in two parts, A. (Where petitioners were prevented by the courts from having the issues in the CBS case *fully and fairly* adjudicated in the prior Progressive trial and were also prevented by the court from rejoining CBS to the Progressive case, was it proper to dismiss the CBS case by Collateral Estoppel?) B. (Where Petitioners were prevented from prosecuting continuing antitrust conspiracy by the courts have they been denied fundamental due process legal entitlements?)

A. COLLATERAL ESTOPPEL CAN NOT APPLY WHERE THE ISSUES WERE NEVER FULLY OR FAIRLY TRIED.

The lower courts erred in dismissing this case under the doctrine of Collateral Estoppel where mutuality did not exist between the parties in a continuation of a per se illegal conspiracy. Wherein defendant CBS was found to be a guilty co-conspirator. Specifically the alleged issues of fact are different in the CBS case from those decided in the Progressive case and those issue of fact in the CBS case have never been decided in any prior litigation and petitioners were prevented from joining CBS to the Progressive case or having the CBS case issues of fact heard in the Progressive case. *Lawlor vs. National Screen Services Corp.*, 349 U.S. 322 (1955) controlling; *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Parklane Hosiery Co. v. Shure*, 439 U.S. 322 (1979), with Annotation 58 L. Ed. 2d 938; *Zdanok v. Glidden Co.*, 327 F. 2d 944 (2d Cir. 1964); Harvard Law Review Vol. 87, P-1485, "Collateral Estoppel of Non Parties," Specifically § II, P-1496, "Due Process and Estoppel of Non Parties and Antitrust Law"; Areeda & Turner, "Antitrust Law," (1978), Vol. II, § 323 e.

For many years considerable confusion and controversy existed in the judicial system as to Collateral Estoppel and mutuality of parties. See Harvard Law Review supra, at P-1491, n. 39, citing *Bernhard v. Bank of America*, 19 Cal. 2d 807, later to be adopted as the *Bernhard rule.* Less confusion existed as to due process and Collateral Estoppel of non parties where the issues of fact had been previously, "*fully and fairly*" litigated. See Harvard Law Review supra, P-1496, n. 72. However some confusion did exist on the due process issue since there was no specific guidance on this subject from the Supreme Court. See 31 ALR 3rd 1044, Anno. § 4 (d), "Constitutional Questions; Due Process," PP-1078 & 1079. Wherein it is clear that the Supreme Court had never directly confronted this issue.

In 1979 this court decided *Parklane Hosiery* supra, with Annotation, 58 L. Ed. 2d 938, "Non Mutuality Estoppel by Judgment," thereby sweeping away all confusion and paving the way for the administration of consistent equitable justice on this subject.

In conflict with and in disregard to this courts mandate in *Parklane Hosiery* and Anno. supra, the 10th Circuit Court of Appeals dismissed the CBS case. The undisputed evidence in this case shows that the issues raised in the CBS case were never, "*fully or fairly*" adjudicated in the prior Progressive case. Thereby causing the Circuit Court to be in conflict with this Courts holdings in *Parklane Hosiery.*

See *Parklane Hosiery* Anno. supra, P-942 § 2(b) and § 4. Wherein it is clear that the fairness test is controlling. Estoppel can not apply if a litigant has not had an opportunity to have his issues "*fully and*

fairly" heard. See Moores Federal Practice supra, Vol. 1B, ¶ 0.441 [3-3], page 736, n. 5 citing Parklane Hosiery.

Petitioner attaches as Appendix C, a certified copy of the Trial Transcript in the Progressive case, Vol. VIII, pp. 1878-1879, to show at least one fundamental denial of due process. Where petitioner had no opportunity to have the issues of fact in the CBS case, "*fully and fairly*" heard in the Progressive case. Which under this courts mandate in *Parklane Hosiery* supra bars the use of Estoppel.

Appendix C shows that Plaintiffs attempted to develop further evidence of the CBS refusal to deal to protect conspiracy in 1976 as part of a continuation of a per se illegal combination. This issue is a full two years later and after the end of the damage period in the Progressive case. Attached as Appendix D is the business records of defendant CBS, showing that the exclusionary anti competitive dealing arrangement in Utah proven to be per se illegal between 1971 and 1974 in the Progressive case, continued until 1976.

Appendix C, Page 1879, lines 1-7 show that the Trial Court *would not even allow Plaintiffs to state why the issue was being proffered.* It is simply undisputable that petitioners had no opportunity to have the issues in the CBS case, "*fully or fairly,*" heard in the Progressive case. Therefore under the standards of this courts holding in *Parklane Hosiery* supra, Collateral Estoppel can not apply.

Olsen proved at trial in the Progressive case, that he was boycotted by CBS as a known discounter and transhipper, to protect Progressive from price competition and the refusal to deal by CBS was to protect

the illegal combination. If that refusal to deal by CBS after 1974 was another method of continuing to protect Progressive from price competition, as is indicated by Appendix D, It would then continue to be per se illegal. *Cernutto v. United Cabinets*, 1979-1 Trade Class ¶ 62 509; *Catalano vs. Target Sales*, 446 U.S. 643, (1980) and Anno. 64 L. Ed. 2d 997.

The legal standard of *Parklane Hosiery* and Anno. require that a litigant should attempt to combine his issues and defendants in one forum to avoid Estoppel. In that regard Plaintiffs made two attempts to rejoin CBS to the Progressive case prior to trial. Both attempts were rejected by the court. Clearly petitioner has met his burden to avoid Estoppel under the standards articulated by this court in *Parklane Hosiery* supra. Therefore it was clearly erroneous for the lower courts to dismiss this case by Collateral Estoppel.

The 10th Circuit Court of Appeals dismissal of the CBS case contrary to the holdings of *Parklane Hosiery* and Anno. Supra is also in conflict with other Supreme Court mandates. See Moores Federal Practice, Vol. 1B, 1982-83 Cumulative Supplement, ¶ 56.17 [5], "Anti-Trust" at pages 56-742 citing *Catalano, Inc. v. Target Sales*, 605 F 2d 1097, (CA 9th 1979), Cert. Granted, Decided 446 U.S. 643 with Anno. 64 L. Ed. 2d 997. Where in it is clear and undisputed as cited in Moores supra, that all evidence and inferences *must be viewed in the light most favorable to the opposing party and should be applied even more stringently in antitrust cases.* The record in our case shows that the District Court dismissed the CBS case three days after Defendants filed their Motion in Limine to Dismiss, without even allowing Plaintiffs to respond. Clearly Plaintiffs evidence was not considered at all, let alone in its most favorable light.

The 10th Circuit has clearly disregarded this courts mandate in *Parklane Hosiery* and *Catalano* supra and is in conflict with other Circuits on the issue of dismissal as consistently applied to antitrust law. See Moores Cumulative Supp. supra at page 56-743, citing *Solinger vs. A& M Records, Inc.*, 586 F 2d 1304, (9th Cir. 1978). In this case the District Court granted a motion to dismiss. The Circuit reversed. That reversal was substantiated by only the allegations in the complaint. In line with such consistent interpretations of the anti-trust laws, one can only wonder how the 10th Circuit could dismiss the CBS case where a per se illegal combination had been proven and the undisputed evidence shows that the exclusionary market continued until 1976, see Appendix D.

B. CONSTITUTIONAL DENIAL OF DUE PROCESS.

Respondent CBS repeatedly cites and the lower courts have accepted and adopted that *Parklane Hosiery* and *Blonder-Tongue* supra stand for the proposition that Estoppel is a bar against the prosecution of continuing antitrust conspiracy. In this respect it should be distinguished that both cases are not antitrust law and specifically do not pretend to control antitrust continuing conspiracy. Both cases defer to and make the distinction that continuing antitrust conspiracy is controlled by a separate line of cases.

In 1955 this court decided *Lawlor v. National Screen Services Corp.*, 349 U.S. 322. This case deals specifically with the subject of continuing antitrust conspiracy and the right of prosecution. Sheparding of the *Lawlor* case supra reveals that it has never been overruled, being accepted by authorities in the field of anti-

trust as controlling. See Areeda & Turner, "Antitrust Law," (1978), Vol. II, § 323 c; Moores Federal Practice, ¶ 0.405, [1] page 180, n. 8, citing *Lawlor*. See *Blonder Tongue* supra, Quick Index Anno. & Ref. Guide, citing an deferring to 31 ALR 3rd 1044, wherein *Lawlor* supra is controlling. See *Parklane Hosiery* supra, Quick Index Guide and Ref., citing and deferring to 31 ALR 3rd 1044, wherein *Lawlor* supra is controlling. See 15 U.S.C.A. (1982) precedent cases, § 15 n. 13, pp. 495-96, also citing *Maricopa County v. American Pipe & Construction Co.* (DC Ariz. 1969), 303 F Supp 77, Affd. 431 F 2d 1145, Cert. Den. 91 S. Ct. 923; also see 15 U.S.C.A. § 15(b) n. 14, also citing *Checker Motors Corp. v. Chrysler Corp.* (D.C. N.Y. 1968), 283 F Supp 876, Affd. 405 F 2d 319, Cert. Den. 89 S. Ct. 1595 and 15 U.S.C.A. n. 543 pp. 475-476 also citing *Partmar v. Paramount Pictures Theater Corp.* (Cal. 1954), 74 S. Ct. 414, reh. Den. 347 U.S. 89. The foregoing line of cases stand for the undisputed proposition that continuing antitrust conspiracy is actionable. Clearly the 10th Circuit Court of Appeals is out of step with this court and the rest of the judiciary on the issue of continuing antitrust conspiracy. This can best be seen by quoting from Areeda & Turner supra at § 323 c;

> "It *can not be emphasised too strongly* that the continuation of a conduct under attack in a prior antitrust suit *is generally held to give rise to a new cause of action.* Lawlor v. National Screen Services Corp. 349 U.S. 322 (1955)."

Emphasis added. Also quoting from the *Lawlor* case supra, at 349 U.S. 329;

> "Acceptance of the respondents novel contention would in effect confer on them a partial immunity

> from civil liability for future violations. Such a result is consistent with neither the antitrust laws or the doctrine of res judicata."

The effect of our lower courts dismissing CBS from liability or prosecution as a proven guilty co-conspirator in a per se illegal combination has produced exactly those results which this court mandated in the *Lawlor* case supra, that were to be forbidden. Where our lower courts have granted CBS immunity from liability or prosecution for past, present and possibly future trespasses of the antitrust laws.

The dismissal of a per se illegal conspiracy defendant by the 10th Circuit is in conflict with this courts holding and Application of the antitrust per se rule of law. See Moores Federal Practice supra, Vol. 6, part 2, ¶ 56.17 [5], page 56-741, n. 5. Citing *United States v. Citizens Publishing Co.* (1969), 394 U.S. 131, 89 S.Ct. 927 at n. [1-5]; as the leading case. It was judicial error under this line of cases to deny Plaintiffs motion for summary judgment where a per se violation was proved. Defendants successfully argued a Constitutional right to trial, but see Moores Vol. 6 supra at n. 4, citing *United States v. White Motor*, 372 U.S. 253. Specifically at page 739 headnotes [4-5], text at page 744. Defendants right to trial is not violated by imposing liability at summary judgment where a per se violation of the antitrust laws exists.

The 10th Circuits deviation from accepted consistent judicial process as articulated in the foregoing cases, should move this court to grant the petition for Certiorari to protect petitioners right to equitable justice as guaranteed by the 5th and 14th Amendments to the Constitution of the United States of America, particularly where petitioner has also been denied equal protection of Congressionally enacted statutory right. See

argument infra at point III as to 15 U.S.C. 1125(a), § 43(a) of the Lahnam Act, 28 U.S.C. 1338(b) and the *Hurn v Oursler Rule*, 289 U.S. 238 as mandated by this court. The law and the Statutes are clear and undisputed on this point that petitioner is entitled to have his issues fully and fairly heard under Constitutional guarantee. See U.S.C.A. Constitution Amendment 14, Section 1, "Due Process" 6th reprint 1978, precedent cases generally and specifically note 4, "Equal Protection" at page 171 and Note 5, page 172. Citing precedent cases as to due process where the 5th and 14th Amendments both apply. It is clear under the cases cited that State or *Federal Government* are forbidden to deny due process and equal protection. Also see updated second Volume, 14th Amendment to end, pp. 265-266, citing *Jones v. Board of Ed.*, 279 F Supp 190, Affirmed 407 F 2d 834, Cert. Granted 90 S. Ct. 145, quoted in part at notes [20-23];

> "This clause was intended to secure *full and equal benefit of all laws and proceedings* for security of persons and property . . ." Emphasis added

The arbitrary refusal of the lower courts to allow Olsen to have his issues fully and fairly heard and decided is not reasonable and is a fundamental deprivation of equal protection and due process of the 5th and 14th Amendments to the Constitution as articulated in the foregoing line of cases. Admittedly the primary purpose of these cases is to protect minority discrimination, but the language is clear and undisputable that the rights of *all persons* is to be protected, not just those of minority ethnic backgrounds.

POINT II

PROVEN CO-CONSPIRATORS ARE JOINTLY AND SEVERALLY LIABLE UNDER THE ANTI TRUST LAWS.

It was plain error for the lower courts to dismiss the defendant CBS from liability and prosecution, when it had been proven and is undisputed that CBS was found to be a guilty Co-conspirator in a per se illegal conspiracy, in which plaintiffs were found to be in the target area. *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981-82), at 451 U.S. 646, citing *City of Atlanta v. Chatanooga Foundry and Pipe Works*, 127 F 23, 26 (Ca 1903); *Virtue v. Creamery Package Mfg. Co.*, Minn. 1913, 33 S. Ct. 202; *Twentieth Century Fox Film Corp. v. Goldwyn*, C.A. (Cal 1964), 328 F 2d 190, Cert. Den. 85 S. Ct. 143; *State of Wash. v. American Pipe & Const. Co.*, D.C. Cal., Or., & Wash., (1968), 280 F Supp 802 n. [1-3]; *Data Digests, Inc. v. Standard & Poors Corp.*, D.C. N.Y. (1967), 43 F.R.D. 386; 15 U.S.C.A. § 15, note 128, 1983 pocket supplement precedents; *Hydrolevel Corp. v. American Soc. of Mechanical Engineers, Inc.*, 635 F 2d 118 Cert. Den.; *Serpa v. Jolly King Restaurants, Inc.*, D.C. Cal. (1974), 62 F.R.D. 626; *Wainright v. Kraft Corp.*, D.C. Ga. (1973) 58 F.R.D. 9; Sherman Antitrust Act § 1, 2, and 15.

The 10th Circuit Court of Appeals dismissal of CBS is in conflict with, is an exception to and is inconsistent with 80 years of consistently administered antitrust law. See *City of Atlanta v. Chatanooga Foundry* supra.

The foregoing line of cases stand for the proposition that antitrust co-conspirators are joint tortfeasors, being jointly and severally liable to any plaintiff in

the target area of a proven conspiracy violating the Sherman Act, and that such a plaintiff may *elect* from any or all of the joint tortfeasors, from whom he will take his damages. See U.S.C.A. § 15 note 128 precedent cases generally and specifically, *State of Washington v. American Pipe* supra at N [1-3], citing *Northwest Oil Co. v. Socony Vacuum Oil Co.*, 138 F 2d 967, (7th Cir. 1943), N. [6], Cert. Den. 321 U.S. 792 (1944), also citing *City of Atlanta v. Chatanooga Foundry* supra. Clearly showing that no case had ever been raised at that time to challenge the *City of Atlanta* case or the United States Code as interpreted by this court. That mandate and consistency remains unchanged. See the *Texas Industries* case supra.

The issue before this court is: will our case now become the exception to 80 years of consistently administered antitrust law to allow the courts to select the co-conspirator, joint tortfeasor from which plaintiffs may recover their damages, or will this court reverse and remand this case compelling the 10th Circuit to conform with the rest of the judicial system?

It should be noted that Plaintiffs did not make a voluntary election to dismiss CBS from the Progressive trial since two attempts were made to rejoin CBS to the Progressive case prior to trial. The rejection of that joinder was judicial error. Under the holding of *Data Digest v. Standard & Poors* supra, N [4-5] and cases cited at ft. n. 16.

POINT III

ACTS OF UNFAIR COMPETITION IN FURTHERANCE OF CONSPIRACY ARE ACTIONABLE UNDER THE ANTITRUST LAWS.

In a clearly erroneous interpretation of law the trial judge in the Progressive case dismissed the Plaintiffs issues of unfair competition as a theory of recovery. ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS UNDER RULE 41(b), pp. 19-20. Stating that the issue impacted unfairly on the Plaintiffs, with the courts there after dismissing the issues in silence.

It should be noted with careful distinction that the issues of unfair competition were a proper and separate theory of recovery where; 1.) The issues were properly pleaded in the Progressive case. Complaint, Fourth cause of action generally and specifically Items 9 & 10, pp. 9-10. Also Amended complaint first cause of action, pp. 3-4; 2.) The issue was extensively argued in the Progressive case. Preliminary Injunction Transcript, 1976, pp. 84-85, 1979, May 4 Trial transcript, testimony of Pete Vieti, (Telephone Company) employee. Trial Exhibit P-10. With the issues being set forth in detail, Plaintiffs Rule 41(b) Opposition Brief, pp. 64-67; Plaintiffs Rule 41(b) Supplementary Opposition Brief, p. 21; Specifically as to damages, pp. 58-59; More specifically as to law and damages, Plaintiffs Memorandum in Support of Motion to Amend and for Additional Findings of New Judgment Pursuant to Rules 52 and 59, Federal Rules of Civil Procedure, at pp. 1-2, Item A; The issues were set forth in the CBS Pre-Trial Order, Item A, (4), and (5). The issues were set forth in detail for the Appellate Court. In the Progressive case, Plaintiff Appellants Brief, POINT IV, pp. 57-58. In the CBS case Plaintiff Appellants Brief, POINT II, page 13.

Petitioner is entitled as a matter of interpreted statutory right and Constitutional guarantee, to have

findings of facts and conclusions of law made, with appropriate damages for the issues of unfair competition, specifically tradename infringement, in furtherance of conspiracy. When those acts of unfair competition were in furtherance of and an inseparable part of the Federal question of conspiracy. Fed. R. Civ. P. 52(a); §43(a) Lahnam Act, codified 15 U.S.C. 1125-(a) and as Mandated by this court in the *Hurn v. Oursler Rule*, 289 U.S. 238, 77 L. Ed. 1148, Codified 28 U.S.C. 1338(b). Specifically related to antitrust law, *Moore v. New York Cotton Exchange*, 270 U.S. 593. As cited in *Hurn v. Oursler* supra. Also as to this circuits previously consistent holdings in *Blue Bell Refining Co. v. Frontier Oil Co.*, 213 F 2d 354; Specifically as to § 43(a) of the Lahnam Act and infringement of common law names. *Big O Tire Dealers v. Goodyear Tire & Rubber Co.*, 561 F 2d 1365, (10th Cir. 1977). Also see *United States v. Timpken Roller Bearing Co.*, 341 U.S. 593, (1951); and *United States v.Sealy, Inc.*, 388 U.S. 350, wherein this court has consistently held that use of Trademarks in furtherance of conspiracy is illegal.

For the lower courts to deny petitioner any consideration of his unfair competition issues as an inseparable part of the Federal question of conspiracy; is a fundamental deprivation of due process and is an erroneous, inconsistent exception to equal protection as guaranteed by Acts of Congress, Federal Rules and the 5th and 14th Amendments to the Constitution of the United States of America. See U.S.C.A. Constitutional references supra under POINT I.

The foregoing issue and more detailed argument, specifically as to the significant judicial controversy and confusion surrounding unfair competition and

the antitrust laws, is set forth in Petitioners, PETITION FOR WRIT OF CERTIORARI in the Progressive case. Before this court as case no. 82-2077, POINT II, pp. 13-17. Petitioner respectfully requests that this issue be combined with and decided jointly with the Progressive case since the findings of the lower courts are not in dispute that CBS was found to be a guilty co-conspirator in a per se illegal combination.

As administrator of the antitrust laws, this court should issue the Writ of Certiorari to prevent our case from becoming an exception to and being in conflict with 80 years of equitable judicial process.

CONCLUSION

For the foregoing reasons Petitioner's respectfully request this court to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review the decision of that Court.

DATED this ..... day of AUG 1 1983, 1983.

Respectfully submitted,

SUMMERHAYS, WELL & CLAWSON

By Lowell V. Summerhays

LOWELL V. SUMMERHAYS

By Edward T. Wells

EDWARD T. WELLS

By W. Andrew Clawson

W. ANDREW CLAWSON

Attorneys for Petitioners

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APPENDIX A

MARCH TERM — MAY 12, 1983

Before Honorable Robert H. McWilliams, Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges.

CLAIR OLSEN and GUITAR CITY STUDIOS, INC.,
a Utah Corporation,
Plaintiffs-Appellants,

vs.

CBS MUSICAL INSTRUMENTS, a division of
Columbia Broadcasting System, Inc.,
Defendant-Appellee.
(No. 82-2398)

This matter comes on for consideration of the motion of Defendant-Appellee, CBS Musical Instruments, for an order affirming the dismissal of appellants' claims by the district court.

Upon consideration whereof, it is ordered that the motion is granted. The order of the United States District Court for the District of Utah dismissing the Plaintiffs-Appellants' claims dated October 25, 1982, in cause No. C-77-0013, is affirmed.

HOWARD K. PHILLIPS
Clerk

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APPENDIX B

GIAUQUE & WILLIAMS
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(801) 533-8383

Attorneys for Defendant
CBS Musical Instruments,
a division of CBS Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CLAIR OLSEN and GUITAR CITY STUDIOS, INC.,
a Utah corporation,

Plaintiffs,

vs.

CBS MUSICAL INSTRUMENTS,

a division of

COLUMBIA BROADCASTING SYSTEM, INC.,

ORDER OF DISMISSAL WITH PREJUDICE

Civil No. C-77-0013

This matter came on for hearing on Friday, October 15, 1982 at the hour of 2:00 p.m. before the Honorable David K. Winder. The plaintiffs were represented by Edward Wells and Andy Clawson. The defendant was represented by Richard W. Giauque and Gary F. Bendinger.

Trial of the above-entitled action was scheduled to commence on Monday, October 18, 1982. Discovery was complete. The defendant had pending a motion for summary judgment and a motion in limine on the issue of the plaintiffs' damage theory and claims. During the course of argument, counsel for CBS moved for dismissal of the plaintiffs' action with prejudice on the ground that the plaintiffs had previously litigated the very same claim for damages and were therefore collaterally estopped from relitigating those damage claims in this action.

The Court has considered the motion in limine and the motion to dismiss. The Court has also considered the fact that the plaintiffs presented no credible evidence or argument that their damage theory and claim in the above-entitled action was different from that presented in *Olsen v. Progressive Music Supply Co., Inc.*, Civil No. C-75-153A, United States District Court for the District of Utah, and the fact that the plaintiffs have already had damages awarded and judgment entered in the *Progressive* litigation based upon the same combination and conspiracy alleged in this action. Based upon all of the foregoing and good cause appearing therefrom,

IT IS HEREBY ORDERED THAT:

1. The plaintiffs' Complaint and action are dismissed with prejudice in their entirety;

2. Judgment of dismissal with prejudice shall be entered forthwith.

DATED this 15th day of October, 1982.

BY THE COURT:

DAVID K. WINDER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF UTAH

BEFORE THE HONORABLE ALDON J. ANDERSON, JUDGE PRESIDING

CLAIR OLSEN, dba Guitar City Studios,

Plaintiff,

- vs -

PROGRESSIVE MUSIC SUPPLY, INC., ACOUSTIC CONTROL CORP., OVATION INSTRUMENTS, INC., aka KAMAN INSTRUMENTS CO.,

Defendants.

Case No. C75-153

VOLUME VIII

Pages 1800 -

TRANSCRIPT OF HEARING

Federal Building, 350 South Main, Salt Lake City, Utah

APPEARANCES:

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Salt Lake City, Utah 84111
Telephone: 323-9841

DATE: May 11, 1979
REPORTED BY: Donna M. Davis, RPR and Ernie Sanchez, RPR

and bring it back after lunch. I can stop now if you'd prefer that I do so and look that up.

THE COURT: That would be better.

MR. SUMMERHAYS: Could I have a three-minute break to do that, Your Honor.

THE COURT: All right. We will be in recess for five minutes.

(Recess taken.)

MR. SUMMERHAYS: I was not able to locate that, Your Honor, and I haven't been able to find it. I'll pass the point if I may. I apologize to the Court for that.

Q Did you attempt to purchase a store in Idaho?

A Yes, I did.

Q And what was the name of that store?

A Melody Shop.

Q And why did you want to purchase that store?

A That store had existing franchises —

MR. CROCKETT: Your Honor, objection. It goes beyond the scope of cross and the reason he wanted to purchase a store outside of the market area is irrelevant.

THE COURT: Well, it would appear to be irrelevant.

MR. SUMMERHAYS: Your Honor, we proffer it for

the purpose —

THE COURT: One can understand why if what he claims was true that he was unable to get products, he might want to get a store in Idaho or someplace else but we ought to talk here about what he did trying to get it because it doesn't help with the issue. I will sustain the objection.

Q Mr. Olsen, did you have records for Guitars, Inc. that you kept on the invoices of purchases of Ovation products or Ovation instruments and checks for which you paid for those instruments?

A Yes, I did.

Q And for what period did those cover?

A The records covered the period from 1964 through 'til today.

Q And did those records include the year 1970?

A Yes, it did.

Q And did you have purchases of Ovation instruments in the latter part of 1970?

A Yes.

Q And were they for the Kaysville store?

A Yes.

Q And were those evidenced by invoices from Ovation and checks paid by Guitars, Inc.?

A Yes.

REPORTER'S CERTIFICATE

I, Ernest M Sanchez, Jr., do hereby certify that the foregoing pages 1878 and 1879, comprise a partial, true and correct transcript of the proceedings had upon the hearing of the above-entitled matte ron May 11, 1979 and that said transcript contains all of the evidence, all o fthe objections of counsel, and all matters to which the same relate.

DATED this 3rd day of February, 1983.

Ernest M Sanchez, Jr.
Court Reporter

APPENDIX D

WHOLESALE SALES VOLUME TO UTAH DEALERS OF FENDER AND RHODES PRODUCTS

	1973	1974	1975	1976	1977	Totals
			(Dollars)			
	(1)	(2)	(3)	(4)	(5)	(6)
Herger Music	$11,269	$18,719	$12,345	$ 7,574	$ 2,847	$ 52,754
Progressive Music	55,523	66,358	41,560	42,096	14,574	220,111
Cal's Music Box	—	—	—	5,614	5,603	11,217
Hart Brother	—	—	—	53,190	26,962	80,152
Lynn's Music	—	—	—	—	4,802	4,802
TOTALS	$66,792	$85,077	$53,905	$108,474	$54,788	$369,036
Progressives % of Total	83.13%	78%	77.1%	38.81%	26.6%	59.64%

Source: Year End Report, "Fender Domestic Sales In Dollars by Territory," 1973-1977.

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APPENDIX E

CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15 U.S.C. § 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty

thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1980, c. 647 § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. § 1125. *False designations of origin and false descriptions forbidden*

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be

transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

28 U.S.C. § 1338

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related clim under the copyright, patent, plant variety protection or trade-mark laws.

June 25, 1948, c. 646, 62 Stat. 931; Dec. 24, 1970, Pub.L. 91-577, Title III, § 143(b), 84 Stat. 1559.

Rule 52. *Findings by the Court.*

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erronenous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and

conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served three (3) copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, upon the following counsel of record:

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Gary F. Bendiger

GIAUQUE & WILLIAMS

500 Kearns Building
Richard W. Giauque
Salt Lake City, Utah 84101

Robert A. Mackey

CBS, Inc.

4024 Redford Avenue
Studio City, CA 91604

Dated this ..... day of AUG 1 1983, 1983

SUMMERHAYS, WELLS & CLAWSON

By Lowell V. Summerhays
LOWELL V. SUMMERHAYS

By Edward T. Wells
EDWARD T. WELLS

By W. Andrew Clawson
W. ANDREW CLAWSON

Attorneys for Petitioners

Office-Supreme Court, U.S.
FILED
SEP 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-188

In the Supreme Court of the United States

October Term, 1983

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation,

Petitioners,

vs.

CBS MUSICAL INSTRUMENTS, a division of Columbia Broadcasting Systems, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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September 1983

QUESTIONS PRESENTED

1. Whether there are any special and important questions presented by the petition for writ of certiorari.

2. Whether the Court of Appeals for the Tenth Circuit and the United States District Court for the District of Utah correctly precluded the petitioner from relitigating issues in *Olsen v. CBS Musical Instruments*, Civil No. C-77-0013, which the petitioner had previously litigated in *Olsen v. Progressive Music Supply, Inc.*, Civil No. C-75-153.

3. Whether the decisions of the Court of Appeals for the Tenth Circuit and the United States District Court for the District of Utah conflict with decisions of this Court or of other federal courts of appeal.

DESIGNATION OF CORPORATE RELATIONSHIPS

CBS Musical Instruments is a division of CBS Inc., a corporation organized under the laws of the State of New York. CBS was formerly named Columbia Broadcasting Systems, Inc. CBS has an interest in the following subsidiaries and affiliates:

Name of Corporation	*State of Corporation*
April Music Inc.	Connecticut
Blackwood Music Inc.	Connecticut
CBS/Black Hawk Cable Communications Corp.	Iowa
CBS/SONY California, Inc.	California
CBS Urban Renewal Corporation	New Jersey
Columbia Recording Corporation	New York
Columbia Television, Inc.	New York

Cruven Inc.	New York
Epic Records, Inc.	New York
5152 Ground Floor, Inc.	New York
Holt-Saunders Inc.	Delaware
Ideal International Ltd.	Delaware
Jare Ventures Inc.	New York
Kiffe Products U.K., Limited	Delaware
Kriven Inc.	New York
Lyon & Healy Harps Inc.	Illinois
MTI Enterprises Inc.	New York
Preference Music Inc.	New York
Priority Music Inc.	New York
Riverfront Redevelopment Corp.	Missouri
Steinway & Sons	New York
Vista Marketing Inc.	New York
Winston Press Inc.	Minnesota

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No. 83-188

In the Supreme Court of the United States

October Term, 1983

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation,

Petitioners,

vs.

CBS MUSICAL INSTRUMENTS, a division of Columbia Broadcasting Systems, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the order of the United States District Court for the District of Utah is reproduced in Appendix A to the petition for writ of certiorari. The trial court's order granting CBS' motion to dismiss is reproduced in Appendix B to the petition for writ of certiorari. In the interest of brevity, they will not be reproduced herein.

RULES OF THE SUPREME COURT OF THE UNITED STATES

The pertinent Rule of the Rules of the Supreme Court of the United States raised by the CBS Musical Instruments' brief in opposition is Rule 17.1. It is reproduced in its entirety in Appendix A.

STATEMENT OF THE CASE

A. *The Progressive Litigation.*

Clair Olsen and Guitar City Studios, Inc. (collectively referred to as "Olsen"), petitioners herein, originally filed an antitrust action in the United States District Court for the District of Utah in April of 1975 against CBS Musical Instruments ("CBS"), Progressive Music Supply, Inc. ("Progressive") and other manufacturers and sellers of musical instruments and audio equipment, alleging various violations of the antitrust laws, including conspiratorial boycott to prevent Olsen from receiving instruments from CBS and the other named manufacturers. *Olsen v. Progressive Music Supply, Inc.*, Civil No. C-75-153 (*"Progressive"*). Subsequently, in 1975, Olsen voluntarily dismissed CBS from that action without prejudice. The stipulation and order of dismissal are reproduced as Appendix B and incorporated by reference herein. After four years of extensive discovery, the *Progressive* suit was tried to the court for 27 days. The trial court, in amended findings of fact and conclusions of law, found that Progressive and two NON-DEFENDANTS, Mrs. Bobbie Herger ("Herger") and CBS, were involved in a boycott to prevent Olsen from receiving instruments from CBS, and that Progressive and Herger conspired to fix resale

prices on CBS products sold to consumers at the retail stores.[1] Olsen was awarded actual damages for the boycott in the sum of $4,303.00. The court found no damages attributable to the Progressive/Herger conspiracy to fix resale prices on CBS products. *Olsen v. Progressive Music Supply, Inc.*, 1982-2 Trade Cas. ¶ 64,928 (D. Utah 1981). All other claims of Olsen were dismissed. That decision was recently affirmed by the United States Court of Appeals for the Tenth Circuit. 703 F.2d 432 (10th Cir. 1983). Olsen has filed a petition for certiorari in the Supreme Court of the United States, Supreme Court Docket No. 82-2077.

B. *The CBS Litigation.*

On January 17, 1977, Olsen commenced a new action in the United States District Court for the District of Utah against CBS alleging the very same claims that formed the basis for the *Progressive* suit. *Olsen v. CBS Musical Instruments* (*"CBS"*), Civil No. C-77-0013. Olsen candidly admits there is but one single alleged conspiracy involved in both cases. *See*, Brief of Appellants filed in the United States Court of Appeals for the Tenth Circuit at 43 reproduced herein as Appendix C. Because the claims in *CBS* were the same claims made by Olsen in *Progressive*, the parties in *CBS* stipulated to stay *CBS* pending the outcome of *Progressive*, which was recognized by the parties as possibly determinative of *CBS*.

---

[1] The court had initially entered findings of fact and conclusions of law finding no conspiracy or boycott. CBS, of course, was not a party to that action and was not represented by counsel. Further, there was no identity of interests between CBS and any of the named defendants so that CBS would be collaterally estopped from arguing whether it ever unlawfully conspired to boycott Olsen. CBS denies any such involvement.

After the conclusion of *Progressive*, trial of *CBS* was set for October 18, 1982. On October 12, 1982, CBS filed a motion *in limine* requesting that the trial court limit Olsen's proof of damages to the damages found in *Progressive*. On October 15, 1982, at the argument on the motion *in limine*, CBS moved to dismiss the action on the grounds that (1) Olsen would be limited to the amount of damages he has been able to prove in the *Progressive* case, and (2) an award of the same damages against CBS that were awarded against Progressive would amount to a double recovery. After considering the arguments of counsel and the memoranda, Judge Winder granted CBS' motion to dismiss on the grounds that Olsen had already litigated and been awarded damages in *Progressive* for the very same combination and conspiracy alleged in *CBS*, and therefore, Olsen was collaterally estopped from relitigating that damage claim in *CBS*. Appendix B to Olsen's petition for certiorari.

On November 8, 1982, Olsen filed a notice of appeal of the trial court's decision with the United States Court of Appeals for the Tenth Circuit. In response to Olsen's appeal, on April 25, 1983, CBS filed a motion to affirm. The CBS motion to affirm was granted by the United States Court of Appeals for the Tenth Circuit on May 12, 1983. Appendix A to Olsen's petition for certiorari.

SUMMARY OF ARGUMENT

Olsen's petition for certiorari represents still another, and hopefully final, attempt to relitigate issues in *CBS*, which were previously fully and fairly litigated in *Pro-*

gressive. Contrary to Olsen's misrepresentations to the Court, this case does not present any antitrust or constitutional issues. Rather, Olsen again merely seeks review of a straightforward application of defensive collateral estoppel by the district court as summarily affirmed by the United States Court of Appeals for the Tenth Circuit. Olsen's petition argues points that are inaccurate, moot and totally irrelevant, and presents nothing that merits this Court's attention. Consequently, as with Olsen's appeal, this petition should be summarily denied.

ARGUMENT

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI.

Rule 17.1 of the Rules of the Supreme Court of the United States states: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." In this case there are no reasons for granting the writ, special, important or otherwise. Nothing in Olsen's petition raises an issue rising to the level of importance required for this Court's review.

Olsen asserts three grounds in support of his petition for writ of certiorari. Point III attempts to argue that the trial judge in *Progressive* committed error with regard to Olsen's unfair competition claim. Since CBS was *not* a party or a participant in the *Progressive* action, Point III is irrelevant to Olsen's petition for writ of

certiorari in *CBS*. The ridiculous nature of this claim is further highlighted by the fact that the unfair competition claim was *not* advanced by Olsen in *CBS*. Accordingly, CBS need not address Olsen's Point III.

In Point II, Olsen also attempts to impose on CBS the findings in *Progressive*, a case in which CBS was not a party or a participant. Olsen's position is clearly contrary to the well-established principles of due process. Since CBS was neither a party nor a participant to the *Progressive* action it is not bound by any determination therein. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971).

Moreover, Olsen has already been awarded its actual damages of $4,303.00, trebled to $12,909.00 from Progressive for the alleged conspiracy. Bond has been posted to secure full payment of that judgment. Consequently, it is clear that Olsen will receive full satisfaction for the alleged injury in *CBS*. This issue, although without merit, is now moot. There is therefore no reason, substantial and important or otherwise, why this Court should review the appellate court's decision which summarily affirmed the trial court's decision. As with Point III, there is no merit to Olsen's Point II.

Finally, Olsen's Point I argues whether petitioners, having once had a full and fair opportunity to litigate the subject damage claims in *Progressive*, were entitled to relitigate those same claims against CBS in another proceeding. The answer to this elementary question of civil procedure would be easily answered by any first-year law stu-

dent. Application of the doctrine of collateral estoppel, as in the instant case, is neither novel nor contrary to established principles of federal procedure, and simply does not present the special, important kind of issue necessary to justify the exercise of this Court's valuable resources. Olsen's final attempt to reargue issues already determined with a view toward a better result falls woefully short.

II. THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY PRECLUDED OLSEN FROM RELITIGATING.

Olsen contends that despite the fact that both *CBS* and *Progressive* involved a single common conspiracy, and despite four years of extensive discovery of that claim and a 27-day trial of it, he was entitled to re-try that same claim with new and different evidence of damages against CBS in another proceeding. The trial court in *CBS* properly ruled that there was simply nothing new to litigate. Furthermore, regardless to Olsen's theory of damages, the damages that Olsen suffered as a result of the acts alleged in *CBS* would have to be the same damages that Olsen suffered as a result of the acts alleged in *Progressive*, because according to Olsen, they result from the very same conspiracy. Appendix C. The transcript of the hearing on CBS' motion *in limine* and motion to dismiss conclusively demonstrate the correctness of the district court's ruling:

> THE COURT: Wasn't the whole point of that case [*Progressive*] that CBS and Herger and mainly Progressive — and possibly others — conspired to do about the same kind of things that are done here?

MR. WELLS: Sure and if we had had CBS in that case we could have gotten the whole thing resolved. Unfortunately, we didn't. I think the law is clear that we can go against them. They produced some of the wrong. If we can prove additional damages, we are entitled to recover.

* * *

THE COURT: What is outside of what I have just quoted to you? I can read you his Conclusion of Law. [In *Progressive.*]

MR. WELLS: I have read that, Your Honor.

THE COURT: I'm sure you have. Isn't that exactly what we are trying here is a Sherman I claim involving a conspiracy to restrain trade among Herger, Progressive and CBS?

MR. WELLS: And others.

THE COURT: What others?

MR. WELLS: Well, I think Leo's and some of these that went along with that are — could be found to be co-conspirators, arguably.

THE COURT: How does the damage get greater because Leo's is involved or Melody is involved? That is what Judge Anderson found is what damage they suffered. He found a Sherman I violation. He concluded that was the damage they suffered. CBS was part of that conspiracy. So, how do you — what are we doing here having a jury decide again what the damages are?

MR. WELLS: Your Honor, we are entitled to put on additional evidence to show that the damages were in fact greater than were found in that case. It is the same as having a new witness on damages. And we are not bound as to CBS by that ruling.

* * *

> THE COURT: Other than the Statute of Limitations that is different in the two cases, and I can see maybe from that proving differently. But there isn't anything in this case that CBS is alleged to have done that Progressive wasn't its coconspirator at the same time and vice versa, isn't that so?
>
> MR. CLAWSON: I believe that is so. I'm not fully advised of the Progressive case. I wasn't involved in that case at all.
>
> Transcript of Proceeding, October 15, 1982, pgs. 26-40, reproduced in Appendix D.

In an attempt to avoid his proof of actual damages of only $4,303.00, Olsen argues that the lower court erred in dismissing the case under the doctrine of collateral estoppel because mutuality did not exist between the parties. (Olsen's Petition at page 7.) Obviously, Olsen fundamentally misunderstands the doctrine of collateral estoppel. The application of defensive collateral estoppel in *CBS* to avoid relitigation of issues previously fully and fairly litigated by Olsen in *Progressive* was neither inconsistent with prior decisions of this Court nor decisions of other federal appellate and district courts. The defensive use of collateral estoppel by a nonparty to the prior litigation is well-settled and has been specifically approved by this Court. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra. See also, Cramer v. General Telephone & Electronics Corporation*, 582 F.2d 259, 267 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *Rutledge v. Boston Woven Hose & Rubber Company*, 576 F.2d 248, 249 (9th Cir. 1978); *Brown v. DeLayo*, 498 F.2d 1173, 1175-76 (10th Cir. 1974).

Olsen's misunderstanding of collateral estoppel is further evidenced by his reliance upon *Parklane Hosiery Company v. Shore*, 439 U.S. 322 (1979) and *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955). *Parklane Hosiery* involved the *offensive* use of collateral estoppel by stockholders in their claim against the defendant corporation for violation of federal securities laws in issuing a materially false and misleading proxy statement in connection with a merger. The stockholders sought to use a prior judgment obtained by the SEC, finding the same proxy statement to be materially false and misleading against the defendant Parklane Hosiery. *Parklane Hosiery*, therefore, involved the opposite situation from that in the instant action. While inapplicable here, the court's sanctioning of the use of offensive collateral estoppel by a non-party to the prior litigation (under certain circumstances) lends further support to the viability of the doctrine of collateral estoppel. Moreover, it is clear that it is a general doctrine applicable to controversies of all kinds, including antitrust.

Similarly, plaintiffs' reliance on *Lawlor v. National Screen Service Corporation, supra*, a case involving the applicability of the doctrine of *res judicata*, a totally different and distinct principle from collateral estoppel, is equally misplaced. In *Lawlor*, defendant National Screen argued that plaintiff Lawlor was barred from bringing the action by the doctrine of *res judicata* as a result of a prior lawsuit involving the parties which was dismissed with prejudice. There the court noted the distinction between *res judicata* and collateral estoppel stating:

> Thus, under the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Recognizing this distinction, the court below concluded that 'No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter.' *Id.* at 326-27. (Citation omitted.)

Unlike *Lawlor*, in *CBS*, the trial court based its decision on the detailed amended findings of fact in *Progressive*, which in turn were based upon four years of extensive discovery and 27 days of trial. Olsen had every motive and opportunity to litigate fully the issue of damages which resulted from the alleged conspiracy. Tacitly admitting that the issues in *CBS* and *Progressive* are identical, Olsen argues that it is not collaterally estopped because the issues were not fully and fairly determined in *Progressive*. The record in *Progressive* described above demonstrates otherwise. Despite numerous appeals, no error has been found in that case. Moreover, in *CBS*, Olsen never claimed *Progressive* was not fully or fairly determined. It is well-settled that an objection may not be raised for the first time on appeal. *Neu v. Grant*, 548 F.2d 281, 286-87 (10th Cir. 1977); *Baker v. Sherwood Construction Co.*, 409 F.2d 194, 195 (10th Cir. 1969); *Community National Life Insurance*

Co. v. Parker Square Savings & Loan Assn., 406 F.2d 603, 606 (10th Cir. 1969). For all of the foregoing reasons, this claim was easily dismissed by the appellate Court.

Finally, Olsen's claimed denial of constitutional rights is utterly unintelligible.

III. THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH DO NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT OR OTHER FEDERAL APPELLATE OR DISTRICT COURTS.

Contrary to Olsen's misstatements, the decision of the *CBS* trial court as affirmed by the Tenth Circuit was nothing more than the routine application of defensive collateral estoppel. Olsen's disingenuous and inadequate attempt to manufacture a conflict constitutes either a serious misunderstanding of the law or an extreme lack of candor with the Court.

CONCLUSION

For all of the foregoing reasons, CBS Musical Instruments respectfully requests that this Court deny Olsen's petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

DATED this 8th day of September, 1983.

Respectfully submitted,

GIAUQUE & WILLIAMS
Richard W. Giauque
Gary F. Bendinger
Counsel of record

Scott A. Call
500 Kearns Building
Salt Lake City, Utah 84101

By .....
Attorneys for Respondent
CBS Musical Instruments

AFFIDAVIT OF SERVICE

On behalf of CBS Musical Instruments and pursuant to Rules 28.2, 28.3 and 28.5(c), I have caused 40 copies of this Brief in Opposition to be mailed to the Clerk of the Supreme Court, and I have caused three copies of this Brief in Opposition to be served by mail upon:

Lowell Summerhays, Esq.
Edward T. Wells, Esq.
SUMMERHAYS, WELLS & CLAWSON
420 Continental Bank Building
Salt Lake City, Utah 84101

counsel of record for Clair Olsen and Guitar City Studios, Inc., petitioners. These documents were deposited in a United States mailbox, with first-class postage prepaid, this 8th day of September, 1983.

To my knowledge this mailing is within the time permitted for filing this brief in opposition. All parties required to be served have been served.

GIAUQUE & WILLIAMS
Richard W. Giauque
Gary F. Bendinger
Counsel of record

Scott A. Call
500 Kearns Building
Salt Lake City, Utah 84101
(801) 533-8383

By .....
Attorneys for Respondent
CBS Musical Instruments

Subscribed and sworn to before me this 8 day of September, 1983.

Notary Public
Residing SLC, Utah

My Commission Expires: 4-11-85

APPENDIX A

Rule 17. Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C 75-153

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation,

Plaintiffs,

vs.

PROGRESSIVE MUSIC SUPPLY, INC., ACOUSTIC CONTROL CORPORATION, OVATION INSTRUMENTS, INC., NORLIN MUSIC INC., formerly CHICAGO MUSICAL INSTRUMENT COMPANY, CBS MUSICAL INSTRUMENTS, a division of COLUMBIA BROADCASTING SYSTEM, INC., ARP INSTRUMENTS, INC., and PEAVEY ELECTRONICS CORPORATION,

Defendants.

STIPULATION OF DISMISSAL AS TO DEFENDANT CBS MUSICAL INSTRUMENTS a division of CBS Inc.

Pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure it is hereby stipulated that the plaintiff may, and by this Stipulation of Dismissal does, hereby dismiss this action and the Complaint and Amended Complaint herein as to the defendant CBS Musical Instruments a division of CBS Inc., this dismissal being without prejudice and without costs to either party. This dismissal is as to said defendant CBS Musical Instruments a division

of CBS Inc. only and plaintiff reserves its rights as to remaining defendants in this case.

DATED this 17th day of November, 1975.

LOWELL V. SUMMERHAYS, INC.
By Lowell V. Summerhays
Attorney for Plaintiffs

CHRISTENSEN, GARDINER, JENSEN & EVANS
By L. R. Gardiner, Jr.
Attorney for Defendant CBS Musical Instruments, a division of CBS, Inc.

VAN COTT, BAGLEY, CORNWELL & McCARTHY

By E. Scott Savage
Attorney for Defendant Ovation Instruments, Inc.

By Stephen G. Crockett
Attorney for Defendants Progressive Music Supply, Inc., Acoustic Control Corporation, Peavey Electronics Corporation

By Bryce E. Roe
Attorney for Defendant Norlin Music Inc., formerly Chicago Musical Instrument Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

ORDER OF DISMISSAL
C 75-153

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation,

Plaintiffs,

v.

PROGRESSIVE MUSIC SUPPLY, INC., et al.,

Defendants.

On November 20, 1975, the parties in the above-entitled case filed a stipulation of dismissal. The stipulation was designed to dismiss CBS Musical Instruments, a division of CBS, Inc., from the case without prejudice and without costs to either party. The stipulation specifically reserved the plaintiffs' rights against the remaining defendants.

IT IS HEREBY ORDERED that defendant CBS Musical Instruments is dismissed from this case without prejudice and without costs.

DATED this 11th day of December, 1975.

ALDON J. ANDERSON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE

TENTH CIRCUIT

Appellate Court Number 82-2398

APPELLANTS BRIEF

District Court No. C77-0013W

District of Utah Central Division

CLAIR OLSEN and GUITAR CITY STUDIOS, INC., a Utah corporation

Plaintiffs,

vs.

CBS FENDER, division of the COLUMBIA BROADCASTING SYSTEMS, INC.

Defendants.

Lowell V. Summerhays, W. Andrew Clawson, and Edward T. Wells of the Firm of SUMMERHAYS RUNYAN & McLELLAND, Attorneys for Plaintiffs Appellant, 420 Continental Bank Building, Salt Lake City, Utah 84101, Telephone (801) 355-5200.

Lowell V. Summerhays, W. Andrew Clawson, and Edward T. Wells, attorneys for Plaintiffs Appellant, herewith respectfully submits the following appeal brief.

POINT IX

FOR JUDICIAL EFFICIENCY THE CBS AND THE PROGRESSIVE CASES SHOULD BE CONSOLIDATED AT THE APPELLATE LEVEL

The CBS and the Progressive case should be consolidated at the appellate level for decision for the following reasons:

1. There is only one conspiracy common to both the CBS and Progressive case. This is supported by the undisputed evidence. See Exhibit "C" attached, where CBS has been named and proved to be a co-conspirator, having been formerly a Defendant in the Progressive case. Examination of the complaint in the CBS case clearly shows that Appellants have alleged an on going continuation of the proven Progressive case conspiracy.

2. It would be a waste of resources for all the parties to have the issues in the two (2) cases decided separately. This is so because Appellants believe errors exist in both cases that will require new trials and different levels of liability. Neither case can be properly resolved until the errors in both cases are resolved. The purpose of Appellate decisions based on final orders is to prevent dealing with the issues in a piece meal fashion. See *Riegal Fiber Corporation v. Anderson Gin Company*, 512 F.2d 784, at 793, n. 19 (5th Cir. 1975), *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 4; *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336, at 1340, (5th Cir. 1969). These cases deal with consolidation of the issues based on F.R.C.P. 41 (b), which is an issue in the Progressive case. While the dismissal of CBS was

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH

BEFORE: THE HONORABLE DAVID K. WINDER

CLAIR OLSEN,

Plaintiff,

vs.

CBS MUSICAL INSTRUMENTS, et al.,

Defendant.

C 77-13

REPORTER'S TRANSCRIPT

October 15, 1982

APPEARANCES OF COUNSEL:

For Plaintiff: EDWARD T. WELLS, ESQ.
ANDREW CLAWSON, ESQ.

For Defendant: RICHARD GIAUQUE, ESQ.
GARY BENDINGER, ESQ.

SHIRLYN SHARPE, RPR
Official Court Reporter
Rm. 330 Post Office Bldg.
350 S. Main Street
Salt Lake City, Utah 84101

Tel: 355-5797

THE COURT: Wasn't the whole point of that case that CBS and Herger and mainly Progressive — and possibly others — conspired to do about the same kind of things that are done here?

MR. WELLS: Sure and if we had had CBS in that case we could have gotten the whole thing resolved. Unfortunately, we didn't. I think the law is clear that we can go against them. They produced some of the wrong. If we can prove additional damages, we are entitled to recover.

THE COURT: What about the 4,000-plus that was awarded over there before trebling? What happens if you get a judgment here? Is that subtracted or is the jury told here about what you got in the Progressive case?

MR. WELLS: I don't believe so, Your Honor.

THE COURT: There is going to be a duplication.

MR. WELLS: In the event there is a duplication, I would expect they would be entitled to an offset. But I'm not so sure there will be a duplication.

MR. GIAUQUE: May I be heard briefly?

THE COURT: Yes.

MR. GIAUQUE: This is the part of the record that I have paid attention to and I have gone over it line by line what occurred in Progressive. The state of the record is as follows: Clair Olsen was asked whether there was a period of time in which he felt that his supply of CBS instruments

MR. WELLS: I have read that, Your Honor.

THE COURT: I'm sure you have. Isn't that exactly what we are trying here is a Sherman I claim involving a conspiracy to restrain trade among Herger, Progressive and CBS?

MR. WELLS: And others.

THE COURT: What others?

MR. WELLS: Well, I think Leo's and some of these that went along with that are — could be found to be co-conspirators, arguably.

THE COURT: How does the damage get greater because Leo's is involved or Melody is involved? That is what Judge Anderson found is what damage they suffered. He found a Sherman I violation. He concluded that was the damage they suffered. CBS was part of that conspiracy. So, how do you — what are we doing here having a jury decide again what the damages are?

MR. WELLS: Your Honor, we are entitled to put on additional evidence to show that the damages were in fact greater than were found in that case. It is the same as having a new witness on damages. And we are not bound as to CBS by that ruling.

THE COURT: Mr. Wells, I'm worried about my earlier ruling, but I'm not the slightest bit convinced by what you just said. I don't believe for a minute that you can

lot different that what was established in that case. The theories are Frank Stuart's and not mine. I can't speak for him. That evidence will be in that trial from his testimony.

THE COURT: Other than the Statute of Limitations that is different in the two cases, and I can see maybe from that proving differently. But there isn't anything in this case that CBS is alleged to have done that Progressive wasn't its co-conspirator at the same time and vice versa, isn't that so?

MR. CLAWSON: I believe that is so. I'm not fully advised of the Progressive case. I wasn't involved in that case at all.

THE COURT: There isn't anything you are entitled to damages for as against Progressive that you wouldn't be entitled to damages for as against CBS, is there?

MR. WELLS: Your Honor, I think that there may be an element in Mr. Stuart's calculations. And again, I can't testify for him. But I — my understanding is that there are — there are differences in the damages that flow to CBS than those that flow to Progressive. And because CBS was not there and I don't know if — you know, I can't quote the findings of Judge Anderson. And I don't have an express recollection of whether or not that issue was addressed. But as to whether or not Progressive may have come out of that conspiracy prior to the time that CBS advised the dealers that

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CLERK

No. 83-188

In the Supreme Court of the United States

October Term, 1983

CLAIR OLSEN and GUITAR CITY STUDIOS, INC.,
a Utah corporation,
Petitioners,

vs.

CBS MUSICAL INSTRUMENTS, a division of
Columbia Broadcasting Systems, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

LOWELL V. SUMMERHAYS
EDWARD T. WELLS
Counsel of Record

W. ANDREW CLAWSON
SUMMERHAYS, WELLS
& CLAWSON

420 Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorneys for Petitioners

QUESTION PRESENTED

WILL THIS COURT DISMISS A PROVEN PER SE ANTI-TRUST CO-CONSPIRATOR BASED ON AN UNETHICAL MISREPRESENTATION OF THE RECORD?

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C. *Defendant is wrong in asserting the damage period is the same in the CBS and Progressive cases.* (CBS Response Brief POINT II.)	2
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NOTE

Authorities previously reproduced and appended for the Court in documents already submitted will not be reproduced again, in the interest of brievity.

I

ARGUMENT

POINT I

THE DEFENDANT CBS' RESPONSE BRIEF IS AN UNETHICAL PORTRAYAL OF THE RECORD IN THIS CASE.

A. *Defendant is wrong in asserting that Petitioners failed to advance their claims of unfair competition in the CBS case.* (CBS Response Brief at Page 6.)

Appellants CBS, 10th Circuit Appeal Brief at pages 13-14 sets forth the unlawful tradename infringement in furtherance of a conspiracy as a significant damage issue. This issue was dismissed in silence in the Progressive case and later by all the lower courts when they failed to make specific findings as required by Fed. R. Civ. P. 52 (a). Petitioners are entitled to consideration of this issue and damages under this Court's mandate in *Hurn v. Oursler*, 289 U.S. 238 (1932). This principle is codified in 28 U.S.C. 1338(b). Additionally the Petitioners' damages on this issue should be considered under the Lanham Trademark Act § 43(a), codified 15 U.S.C. 1125(a) and under the 10th Circuit's holdings in *Big O Tire Dealers v. Goodyear Tire & Rubber Co.*, 561 F. 2d 1365 (10th Cir. 1977). With Petitioners being able to elect to take their damages from any proven co-conspirator. *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981-82). Defendant CBS is a proven co-conspirator. (CBS Response Brief at page D-3. By filing suit against CBS in 1977 prior to any judgment in the Progressive case, Petitioners have elected to take some of their damages from CBS.

B. *Defendant is wrong in asserting that Petitioners have never alleged that the conspiracy issues affecting CBS were not fully and fairly litigated in the Progressive case.* (Response Brief at Page 11.)

Appellants CBS, 10th Circuit Appeal Brief at page 11 and Point VI, pages 27-30, clearly sets forth exactly that argument which Defendant asserts was never raised. The CBS Petition for Certiorari at Appendix C sets forth undisputed evidence which the trial court in the Progressive case refused to hear. That evidence was related to the continuation of the proven conspiracy into the years 1975 and 1976. The refusal of the court to hear this evidence prevented the continuing conspiracy from being fully and fairly litigated in the Progressive case. Thereby placing the lower courts in conflict with this Court's mandate in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971), where in it is clear that collateral estoppel cannot be used to deprive a litigant of fully and fairly presenting actionable issues. Our lower court's holding barring Petitioner from prosecution of continuing conspiracy by collateral estoppel are also in conflict with this Court's controlling mandate in *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955). See the CBS Petition for Certiorari at POINT I for argument.

C. *Defendant is wrong in asserting the damage period is the same in the CBS and Progressive cases.* (CBS Response Brief, POINT II.)

The October 15, 1982 Transcript reads:

> THE COURT: In any event, I haven't heard Mr. Wells say there are any conspirators other than Fender. I don't see any purpose in proceeding in the Melody Shop Claim.
>
> MR. WELLS: The conspirators were Progressive and Herger. The reason the Melody Shop is important is because if CBS had allowed us to acquire the Melody Shop with its franchises intact, then we would have had instruments in Utah and could have competed against them and would have destroyed the basis for their price fixing.

(T. at 16). Clearly both district courts in the Progressive and the CBS case refused to hear evidence of continuing conspiracy depriving Petitioners of fully and fairly litigating his claims even thought a per se conspiracy was proved in the Progresive case for years 1971-1974. See Progressive case, Petition for Certiorari, Appendices A & B.

The best evidence this Court could have of the continuation of the anti-competitive effect proven in the Progressive case is the undisputed business records of CBS. See CBS Petition for Certiorari at Appendix D. The appendix clearly shows that all competitors had been eliminated in Utah to protect the conspiracy. It also shows that no competitors were restored to the market until 1976. The dismissal of CBS without examination for economic harm of the continued anti-competitive effect during the years 1975 and 1976 is in conflict with this Court's controlling mandate in *Lawlor v. National Screen*, supra and *Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977). In dismissing CBS the lower courts have ignored this Court's man-

date in the above cited cases and have replaced the rule of reason standard in deciding anti-trust law with an assumption of reasonableness.

The undisputed continuing anti-competitive market effect in the years 1975 and 1976, the attempt by Petitioners to acquire the Melody Shop in 1976, which held the existing CBS franchise, and the refusal of CBS to deal with Petitioners if they acquired the Melody Shop, clearly demonstrates the continuing efforts of CBS to perpetuate the conspiracy by protecting Progressive from price competition. Contrary to the assertions of CBS, these facts show the present action contains a new and different damage period from that decided in Progressive. CBS has confused the courts and has gained dismissal by citing language from the record which relates to Petitioners' claims that they are entitled to more damages than were awarded in the Progressive case. Petitioners' damage claims can be summarized in three specific areas. 1) Damages should be more than were awarded in the Progressive case. See POINT III, Progressive Petition for Certiorari. 2) Multiple damages for multiple injuries should be awarded. See Progressive Petition for Certiorari at page 22. 3) Petitioners claim a continuing conspiracy with CBS and a new and different damage period at least for the years 1975-1976. POINT III CBS Petition for Certiorari.

D. *The Defendant CBS does not oppose, defend, or even dispute that Petitioners have been denied statutory due process of law.* (CBS Response Brief, page 12.)

The CBS Response Brief at page 12 states that Petitioners constitutional arguments are "utterly unintelligible."

The Defendant language thereby disparages the competency of this Court, the Congress of the United States, the Federal Statutes and the 5th and 14th Amendments to the Constitution. The position of CBS infers that this Court's mandate in *Hurn v. Oursler*, supra, the Federal Statutes, supra, as framed by Congress, and the 5th and 14th Amendments to the Constitution as framed by Congress and ratified by the states are incomprehensible. If the Defendant really believes its argument, this fact itself is a special and important reason under this Court's Rule 17 to grant the writ of Certeriorari.

CONCLUSION

For all of the foregoing reasons CBS should be held accountable for its participation in a per se illegal conspiracy and should not be dismissed. Petitioners' argument can be verified as true if and when they are allowed to certify and forward the record below.

Respectfully submitted,

ORIGINAL SIGNED BY:

By Lowell V. Summerhays

Lowell W. Summerhays

SUMMERHAYS, WELLS & CLAWSON

By .....

Edward T. Wells

By .....

W. Andrew Clawson

Attorneys for Petitioner

Dated Sept. 16, 1983.

CERTIFICATE OF SERVICE

The undersigned a member of the bar of the United States Supreme Court, hereby certifies that three true and correct copies of the above and foregoing Reply Brief of Petitioners Clair Olsen and Guitar City Studios, Inc. in Reply to Respondent CBS Brief in opposition to Petitioners' Petition for Certiorari have been either personally delivered or placed postage prepaid, first class in the United States Mail, to the following:

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4024 Redford Ave.
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DATED this SEP 16 1983 day of September, 1983.

ORIGINAL SIGNED BY:
By Lowell V. Summerhays
Lowell W. Summerhays

SUMMERHAYS, WELLS & CLAWSON

By .....
Edward T. Wells

By .....
W. Andrew Clawson